Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of the Verizon Telephone Companies	)	
for Declaratory Ruling or, Alternatively, for	)	WC Docket No. 04-242
Interim Waiver with Regard to Broadband	)	
Services Provided via Fiber to the Premises	)	
	)	
Conditional Petition of the Verizon Telephone	)	
Companies for Forbearance Under 47 U.S.C.	)	
§ 160(c) with Regard to Broadband Services	)	
Provided via Fiber to the Premises	)	

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA"), by its attorneys, submits the following reply comments in the above-captioned proceeding.

NCTA is the principal trade association of the cable television industry. Its members provide video programming, broadband Internet, and other services throughout the United States. NCTA also represents programmers and suppliers of equipment to the cable television industry.

NCTA reviewed with interest the two petitions filed by the Verizon Telephone Companies ("Verizon") on June 28, 2004[1] and the various comments filed in response on July 22, 2004.[2]

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[1] For convenience, the petition requesting a declaratory ruling or, alternatively, an interim waiver is cited here as *VZ Petition 1*, and the conditional petition seeking forbearance is cited here as *VZ Petition 2*. The memorandum of points and authorities that is appended to both petitions is cited as *VZ Memo*.

[2] The Commission solicited comments and replies by public notice. *See* FCC Public Notice, *Pleading Cycle Established for Comments on Verizon's Petition for a Declaratory Ruling, or, Alternatively, Interim Waiver and Verizon's Conditional Petition for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises*, DA 04-2006 (July 1, 2004). For convenience, comments are cited by giving the abbreviated name of the commenting party and the relevant page numbers (e.g. ALTS at 2-3).

NCTA shares Verizon's interest (and that of the Commission and of Congress) in advancing a pro-competitive and deregulatory policy framework that promotes investment and innovation in competitive broadband facilities.[3] The petitions require greater clarity and more precise use of precedent, however, and these comments address these points.

First, much of the discussion in both petitions is couched in terms of "broadband services." The services at issue are variously described as "FTTP broadband," "FTTP broadband services," or "broadband transmission."[4] These terms are not defined, and the context offers no way to know precisely to what Verizon is referring.[5] There are some suggestions that Verizon is not referring to all of the services that would be carried over its broadband facilities. But there is no delineation of which service or services Verizon is asking the Commission to focus its attentions on and the information Verizon provides is not internally consistent.[6]

Thus, these petitions require greater clarity. In particular, to the extent that services contemplated here constitute "cable service" as defined by Title VI of the Act and not telecommunications service, Verizon should readily commit to complying with applicable cable franchising requirements just as other telcos (and all cable service providers) are required to do when offering cable service.[7]

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[3] In this respect, NCTA's views are somewhat akin to those expressed by Alcatel, Ciena, and Corning.

[4] *VZ Petition 1* at 1; *VZ Memo* at 2, 5.

[5] *Accord* Sprint at 3 ("Verizon speaks very generically about 'broadband services' without providing any definition or examples.").

[6] *Compare VZ Memo* at 1 (suggesting that petitions' focus is on "combination of high-speed Internet access with video service") *and* 4 (waivers or forbearance sought for "FTTP video programming *and* FTTP broadband services" (emphasis added)) *with id*. at 5 (waivers are sought "only for broadband transmission (not voice or video services) . . . .").

[7] *See* 47 U.S.C. § 571. While Verizon says that it "intends . . . to obtain cable franchises for those multichannel video offerings that arguably are subject to the franchise obligation under Title VI of the Communications Act," *VZ Petition 1* at 2, this articulation is imprecise as to what Verizon is committing. This is difficult to understand given Verizon's (and its predecessor companies') strong assertion of its first amendment right to become franchised cable operators, *see* C&P Tel. Co. of Va. v. U.S., 830 F. Supp. 909 (E.D. Va. 1993), *aff'd*, 42 F.3d

Second, because of NCTA's involvement and interest in the regulatory classification of cable modem service, we believe it is important that the record in these proceedings accurately cite those regulatory developments. In discussing broadband, the petitions present a different legal and factual situation than that presented in the *Cable Modem Declaratory Ruling*, to which the petition refers. That proceeding did not concern the cable industry's "broadband services" – a term that, as a regulatory matter, would lack the same precision if used by a cable company just as it does here when used by a telephone company.[8] Rather, that proceeding focused precisely on a particular service with particular characteristics.

The Notice of Inquiry ("*NOI*") that led to the *Cable Modem Declaratory Ruling* sought to "explore issues surrounding high-speed access to the Internet provided to subscribers over cable infrastructure, so-called 'cable modem service.'"[9] The *NOI* began by "seek[ing] to develop a factual record regarding the services provided by cable operators,"[10] and it then posed a number of questions designed to illuminate whether the high-speed Internet services provided by cable operators could be properly classified as a "cable service," a "telecommunications service," an

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181 (4th Cir. 1994), *vacated as moot*, 516 U.S. 415 (1996), prior to Congress's repeal of the cable-telco cross-ownership ban in 1996. Since then, Verizon, the first and arguably most assiduous telco litigant asserting the constitutional claim, took virtually no advantage of its hard-fought right to apply for a franchise. The assumption that Verizon would observe traditional franchise requirements must also be tempered by its unsuccessful effort to obtain state legislation in California to allow it to serve something less than the entire franchise territory which a cable company serves. California law requires that any additional franchisee "wire and serve the same geographical area [as an existing franchisee] within a reasonable period of time." See California Assembly Bill 2242 (2003-2004 session), available at http://www.assembly.ca.gov/acs/acsframeset2text.htm (search bill number 2242).

8 The expanded bandwidth and two-way capability made possible by $85 billion of cable plant upgrades enables cable companies to provide a wide variety of services -- *all* of which might reasonably be described as "broadband services." But the regulatory regime applicable to each such service depends in large measure on its particular characteristics.

9 *See* Notice of Inquiry, *Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, 15 FCC Rcd. 19287 ¶ 1 (2000) ("*Cable Modem NOI*"). NCTA believes that the term "high-speed cable Internet" better captures the nature of the service, but generally uses the Commission's terminology here.

10 *Cable Modem NOI*, 15 FCC Rcd. ¶ 14.

"information service," an "advanced telecommunications capability," or possibly something "distinct from the regulatory classifications" just mentioned.[11]

The *NOI* triggered two rounds of formal comments by dozens of interested parties, hundreds of informal comments, and dozens of substantive ex parte submissions.[12] At the conclusion of that lengthy and comprehensive process, the Commission was able to base its determinations on a detailed understanding of the features and applications of cable modem service,[13] the network architecture and technology of cable modem service,[14] and the business models of cable modem service.[15] In reaching its conclusion that cable modem service is properly classified as an "information service" for purposes of the Act, the Commission considered, in addition to the language of the statute, "*the factual record in this proceeding, and particularly the descriptions by cable operators and others of how cable modem service is provided today and what functions it makes available to subscribers and to ISPs*."[16]

Obviously the proceeding that culminated in the *Cable Modem Declaratory Ruling* was highly fact intensive. Verizon seeks a declaratory ruling, interim waiver, or forbearance for a vaguely defined service or set of services whose features, applications, architecture, and business models have not even been disclosed, much less fully described and debated.[17] The

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[11] *Id.* ¶¶ 15-24.

[12] The Commission's Electronic Comment Filing System records over 500 entries under GN Docket No. 00-185, the docket number pertinent to the Notice of Inquiry and the Declaratory Ruling on cable modem service.

[13] *See Cable Modem Declaratory Ruling* ¶¶ 10-11.

[14] *See id.* ¶¶ 12-19.

[15] *See id.* ¶¶ 20-29.

[16] *Id.* ¶ 33 (emphasis added).

[17] Although Verizon asserts (*VZ Petition 2* at 4) that "FTTP can be expected to facilitate the creation of new, feature-rich services" and implies that the requested rulings would apply to these, it gives no clue what kinds of services Verizon is referring to. Curiously, Verizon attaches to its petitions a declaration that mainly concerns the "*video* components" of the planned FTTP network and the means by which "*video* transmissions" will be

Commission's finding that cable modem service constituted an information service was predicated on the offering of "a single, integrated service" that included "[e]-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the DNS."[18] Verizon has mentioned none of these functions, nor even defined its "broadband services" as consisting of Internet access.[19]

Further, the *Cable Modem Declaratory Ruling* focused solely on cable modem service provided to residential households; "offerings of high-speed Internet access that are targeted at businesses, including small ones," were specifically excluded.[20] Verizon's petitions contain no such limitation.

Verizon's characterization of events subsequent to the *Cable Modem Declaratory Ruling* also is sometimes imprecise. Verizon acknowledges that the *Cable Modem Declaratory Ruling* is currently the subject of some legal uncertainty, having been partially reversed by the U.S. Court of Appeals for the Ninth Circuit but with that mandate having been stayed pending the disposition of petitions for certiorari.[21] Putting to one side the legal uncertainty resulting from the *Brand X* decision, the petitions fail to acknowledge that the Commission has pending an Notice of Proposed Rulemaking to explore the extensive legal consequences of its classification.

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carried, while elsewhere indicating that it does not ask the Commission to address its video offerings. *See supra* note 10.

[18] *Cable Modem Declaratory Ruling* ¶¶ 36, 38.

[19] At one point, Verizon suggests that its services will *not* have the characteristics that led the Commission to find cable modem service to be an information service. *See VZ Memo* at 5 (waivers are sought "only for broadband *transmission*") (emphasis added).

[20] *Cable Modem Declaratory Ruling* ¶ 1 & n.5.

[21] Several commenting parties find it peculiar that Verizon is seeking to invoke the benefits of a Commission ruling that has been reversed. *E.g., ALTS Comments* at 7. NCTA firmly believes that the Commission's ruling will be reinstated by the Supreme Court, but that has yet to occur and it is therefore an odd time for Verizon to claim that the Commission should extend that ruling.

The Commission has yet to decide on a host of questions relating to whether cable modem service will be subject to access requirements, how certain rights-of-way and franchising issues will be resolved, and what kinds of "consumer protection and customer service" standards may be imposed.[22] Various pole attachment, universal service, and subscriber privacy issues also remain pending.[23] Cable operators and others have presented detailed comments and reply comments on those issues,[24] and the Commission will presumably make its decisions in due course. Thus, even if the Supreme Court reinstates the *Cable Modem Declaratory Ruling*, it is by no means clear how cable modem services will be regulated, let alone fully deregulated. Yet the petitions seek total deregulation by looking at the work-in-progress as a *fait accompli* precedent.

In addition, NCTA believes that the petitions also mischaracterize the effect of the Ninth Circuit's decision. Verizon claims that the *Cable Modem Declaratory Ruling* "contained three key determinations":

> *First*, the Commission declared that cable modem service is properly classified as an information service and not a common-carrier telecommunications service within the meaning of the Telecommunications Act of 1996 . . . . *Second*, to the extent that they might be deemed to apply to cable modem service, the Commission on its own motion waived the common-carrier rule that would otherwise require cable companies to unbundle the transmission component of their information services and offer it on a stand-alone basis under tariff at cost-based rates. *Third*, the Commission determined that if cable companies offer broadband transmission to ISPs, they may do so on an individual-case basis rather than a common-carriage basis.[25]

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[22] *See Cable Modem Declaratory Ruling* ¶ 108.

[23] *See id.* ¶¶ 109-112.

[24] NCTA and others have presented abundant reasons in that record why state and local authorities must be constrained from imposing any new requirements or fees on cable modem service, and in support of the outcome we desire on all the other pending issues, but the fact remains that these regulatory uncertainties continue to overhang the offering of cable modem service. So, too, do related issues of regulatory classification and consequences for wireline broadband services – presumably including some of the same services covered by the instant petitions.

[25] *VZ Memo* at 3-4.

Verizon also states that "the Ninth Circuit subsequently reversed this first determination in *Brand X Internet Services* – though its decision has been stayed – but the court left intact the remaining two determinations, which correspond to the relief Verizon is seeking in its present petitions."[26] Verizon's characterization of the second of the three determinations is difficult to understand.

The Commission's main reason for rejecting Earthlink's argument was that the cases it relied upon involved "traditional wireline common carriers providing telecommunications services (*e.g.*, telephony) separate from their provision of information services."[27] The Commission emphasized that it had "never before applied *Computer II* to information services provided over cable facilities. Indeed, for more than twenty years, *Computer II obligations have been applied exclusively to traditional wireline services and facilities*. We decline to extend *Computer II* here."[28]

Computer II regulatory restraints were based on the ubiquity and legacy aspects of the incumbent network. Verizon, obviously, is in a different position from cable in terms of the focus of the *Cable Modem Declaratory Ruling*; it seeks to avoid, not the *extension* of *Computer II* to a previously unimagined situation, but the *application* of *Computer II* to the circumstances for which it was originally intended.

Earthlink went on to argue that the *Computer II* rules should at least compel the unbundling of cable modem service for those cable operators that offer local exchange service as competitive local exchange carriers. The Commission disagreed, reiterating a prior statement

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[26] *Id.* at 3.

[27] *Cable Modem Declaratory Ruling* at ¶ 43.

[28] *Id.* (emphasis added).

that "'the core assumption underlying the *Computer Inquiries* was that the *telephone network* is the primary, if not exclusive, means through which information service providers can gain access to their customers'" and stressing that *Computer II* obligations created special safeguards and conditions for "AT&T and GTE, and later the Bell Operating Companies."[29] It is perfectly legitimate to question whether those requirements that apply to it should be removed, and that is directly at issue in the pending *Wireline Broadband* proceeding.[30] But this discussion in the *Cable Modem Declaratory Ruling* – which so carefully distinguishes between cable companies and Bell companies – does not lead to the conclusion that cable operators and Bell companies must be treated identically.[31]

The Commission said that, "[e]ven if *Computer II* were to apply [which the Commission had just held that it did not], however, we waive on our motion the requirements of *Computer II* in situations where the cable operator additionally offers local exchange service."[32] It did this because applying *Computer II* to cable operators that had begun to provide competitive local exchange services would create an unreasonable distinction and would cause cable operators to withdraw from the telephony market, thus "undermin[ing] the long-delayed hope of creating facilities-based competition in the telephony marketplace and thereby seriously undermin[ing] the goal of the 1996 Act to open all telecommunications markets to competition."[33] In short, although Verizon may well be able to show good reasons why it should be freed of *Computer II* requirements for particular services offered in particular markets, the reasoning in the waiver

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[29] *Id.* ¶ 44 (emphasis in original).

[30] *See generally Wireline Broadband Classification Proceeding*, *supra* note. That proceeding does not, however, apply to "broadband" generally but rather broadband access to the Internet.

[31] *See ALTS Comments* at 8-9 (citing numerous historical differences between cable companies and telephone companies).

[32] *Cable Modem Declaratory Ruling* ¶ 45.

[33] *Id.* ¶ 47.

discussion of the *Cable Modem Declaratory Ruling* applies to companies, like cable operators, for whom *Computer II* was never designed.

Finally, Verizon's conditional petition for forbearance presents an additional problem in so far as it relies on anything contained in the *Cable Modem Declaratory Ruling.* The petition asserts that "the relief [it] is seeking is nothing more than the Commission has already afforded to cable modem operators."[34] But the *Cable Modem Declaratory Ruling* specifically states that cable modem operators were not being granted, by that order, any Title II forbearance.[35] Rather, the Commission *tentatively* concluded that forbearance from Title II regulation of cable modem service was appropriate and put that issue out for public comment in its companion Notice of Proposed Rulemaking.[36] The Commission has *proposed* to forbear from Title II requirements for providers of cable modem providers. But that intention provides no Commission precedent to *grant* forbearance, even if its request were based on comparable circumstances and limited to comparable services

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NCTA has no interest in advocating that Verizon be subjected to any unnecessary regulations, but the instant petitions require greater specificity as to the services they are talking about. And they should more accurately discuss and where necessary distinguish the Commission's *Cable Modem Declaratory Ruling* to the extent they rely upon it.

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[34] *VZ Memo* at 14.

[35] *Cable Modem Declaratory Ruling* ¶¶ 46-47.

[36] *Id.* at ¶ 95.

Respectfully submitted,

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